Supreme Court, U.S.
FILED

No. 01-1630 NOV 21 2001

OFFICE OF THE CLERK

In The Supreme Court of the United States

THOMAS LEE MOODY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

James Clayton Lewis, Esquire
Rabinowitz, Swartz, Taliaferro,
Lewis, Swartz & Goodove , P.C.
150 Boush Street, Suite 800
Norfolk, Virginia 23510
(757) 622-3931

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

Introductory Statement

The Appellant, Thomas Lee Moody ("Moody"), had entered into a plea agreement with the United States. Part of the agreement provided that should Moody perform his obligations in good faith, the United States would move to reduce his sentence pursuant to Federal Rule of Criminal Procedure 35(b). The government did not make the Rule 35(b) motion and the District Court denied Moody's motion for a hearing as to why the government had not made the motion. Thereafter, Moody advised his counsel he wished to appeal and a Notice of Appeal was filed more than 10 days after the entry of the District Court's order denying the motion.

I. Questions Presented

A. Whether the Court of Appeals Erred in Granting the United States' Motion To Dismiss?

B. Whether the Court of Appeals Erred in Refusing To Grant Moody's Appeal of the District Court's Refusal To Hold A Hearing on The United States' Refusal To Make A Rule 35(b) Downward Departure Motion?

II. Parties To The Proceeding

1. United States of America, Appellee

2. Thomas Lee Moody, Appellant

TABLE OF CONTENTS

III. Questions Presented i

IV. Parties To The Proceeding ii

V. Table Of Contents iii

VI. Table of Authorities iv

VII. Opinions Below v

VIII. Jurisdiction vi

IX. Constitutional and Statutory Provisions vii

X. Statement of the Case 1

XI. Reasons for Granting Petition 3

XII. Conclusion 9

IV. TABLE OF AUTHORITIES

Blackledge v. Allison, 431 U.S. 63, 75, n. 6 (1977) . . . 5

Boykin v. Alabama, 395 U.S. 238 (1969) 7

Ricketts v. Adamson, 483 U.S. 1, 16-23 (1987) . . . . 5 - 8

US v. Pridgen, 64 F.3d 147 (4th Cir. 1995) 4

V. OPINIONS BELOW

A. Court Of Appeals Order Granting United States' Motion To Dismiss. August 23, 2001.

B. District Court Order Denying Appellant's *Motion To Be Heard.* June 15, 2001.

VI. Jurisdiction

This Honorable Court has jurisdiction to hear this Petition For Writ of Certiorari as the Appellant is appealing a final judgment of dismissal entered by the Fourth Circuit Court of Appeals on August 23, 2001. United States Supreme Court Rule 14(e).

VII. Constitutional and Statutory Provisions

1. Rule 35(b) of the Federal Rules of Criminal Procedure

2. 18 U.S.C. 3742

3. Due process Clause, United States Constitution

VIII. Statement of the Case

On February 15, 1999, Thomas Lee Moody appeared before the United States District Court For The Eastern District of Virginia and pled guilty to conspiring to distribute 50 grams or more of crack cocaine, a Schedule I Narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii), all in violation of Title 21, United States Code, Section 846. Moody had made said guilty plea pursuant to a Plea Agreement he had entered into with the United States. In said agreement, Moody agreed to cooperate fully with the United States and, in exchange, the United States agreed to, *inter alia*, notify other prosecutorial agencies of Moody's cooperation, Plea Agreement Paragraph 8(a), not to prosecute Moody's brother, Plea Agreement Paragraph 8(d) and " to seek any departure from the Sentencing Guidelines . . .if, in its sole discretion, the United States determines that the defendant has provided substantial assistance and that such assistance has been completed and such a departure is appropriate." Plea Agreement, Paragraph 9. It is undisputed that only the United States can make a motion to reduce a defendant's sentence.

Moody cooperated fully with the United States, telling them everything he knew and remaining ready, able and willing to testify or cooperate with the United States in any capacity that it might demand. Nonetheless, the United States, without explanation or warning, declined to make the motion necessary for the District Court to consider reducing Moody's sentence in light of his cooperation. No discussion was permitted or considered by the United States.

On April 5, 2001, Moody filed a *Motion For Reduction of Sentence*, wherein he sought, pursuant to Paragraph 12 of the Plea Agreement, to have the District Court which sentenced him review the United States' refusal to move the District Court for a reduction in Moody's

sentence. In the motion, Moody made out a *prima facie* case that the United States was violating his constitutional right to Due Process by refusing to make the requisite motion. Moody alleged in his motion that as he had fulfilled his obligations under the Plea Agreement, the United States' refusal to make the motion was either made in bad faith or for an unconstitutional motive or the United States had entered into the Plea Agreement in bad faith, never intending to honor its obligations set out therein.

The District Court then issued an *Order* wherein it denied Moody's motion, noting that Moody had made generalized allegations of improper motive, "unsupported by any claims of evidentiary support." From this Order Moody appealed to the United States Court of Appeals for the Fourth Circuit.

The United States moved to dismiss Moody's appeal for having not been filed in a timely manner. Despite Moody's responding that Rule 35(b) motions and appeals therefrom are not specifically governed by the ten day period in which Notices of Appeal are to be filed in appeals from criminal convictions, the Fourth Circuit dismissed Moody's appeal without comment.

From these rulings Moody respectfully appeals and prays that this Honorable Court order that a Writ of Certiorari issue forth.

IX. Reasons for granting petition

A. The Court of Appeals for the Fourth Circuit Improvidently Granted the United States' *Motion to Dismiss*.

The Court of Appeals' opinion does not state why the *Motion to Dismiss* was granted, but simply states that it is. The Court of Appeals' affirmation of Judge Doumar's dismissal of Moody's *Motion To Hold Hearing* must be premised upon acceptance of the United States' argument that the Notice of Appeal of Judge Doumar's denial had to have been filed within ten (10) days of the entry of said denial. While it is true that Rule XX establishes that where one appeals a criminal conviction, a *Notice of Appeal* must be filed within 10 days of the entry of the *Final Commitment Order*, neither the language nor the intent of the rule applies it to appeals of "post-conviction motions."

A "post conviction motion," as the term will be used herein, is one such as that which Moody had moved for in the District Court - *a motion filed long after the time of appeal of the conviction had passed but still within proper time limitations set out with regard to post conviction proceedings*. In Moody's case, the post conviction motion related to a reduction in the defendant';s sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure ("Rule 35(b)"). A Rule 35(b) motion cannot, by its very terms, be made until after the defendant has been convicted and aided the government substantially in other cases. It would be a rare case indeed where all of this was accomplished within 10 ten days.

Accordingly, it is not surprising that Congress enacted 18 U.S.C. 3742, found in Chapter 235, which is titled "Sentences," and which specifically governs how appeals of Rule 35(b) decisions are to be taken. 18 U.S.C. 32742

provides for the appeal of "otherwise final sentence if the sentence - (1) was imposed in violation of law." Importantly, 18 U.S.C. 3742 makes no reference to any other statute, rule, etc. and does not establish a time certain within which to file a *Notice of Appeal* for a Rule 35(b) issue.

The instant appeal is of the district court's decision of a Rule 35(b) issue. The question arose a year after the case had been ended and thus is a "post-conviction"motion relating to the sentence of the case, not the trial. That motion - filed one year after the underlying trial had ended and the final trial order had been entered.- prayed that the district court hold a hearing as to the application of Rule 35(b) and whether the United States has acted in bad faith or with unconstitutional motives in refusing to make the Rule 35(b) motion. SEE Motion.

The Court of Appeals' holding is also undermined by that court's previous decision in *US v. Pridgen*, 64 F.3d 147 (4th Cir. 1995). In that case, the Fourth Circuit held that a Rule 35(b) motion is a post conviction and post period within which to appeal motion and, therefore, it is governed by 18 U.S.C. 3742. Such a motion, therefore does not have a prescribed time within which a *Notice of Appeal* must be filed. Moody's interpretation that a Notice of Appeal of a Rule 35(b) issue does not have to be filed within 10 days of the district court's issuance of the order comports with the intention and literal terms of the statutes in question.

B. The Court of Appeals Erred In Not Reversing The District Court's Denial Of Moody's Motion To Be Heard.

The District Court's refusal to grant moody a hearing as to why the united states did not file Rule 35(b) motion to reduce his sentence pursuant to the plea agreement moody had entered into with the united states was error. Moody's

challenge of the United States' refusal to move for a reduction in moody's sentence alleges a prima facie case of the united states' having violated moody's right to due process by having acted in bad faith and/or unconstitutional motive in not making the motion.

Both a Due Process right and a commercial law right protected by the Constitution exist in the bargain that defendants strike with the United States in Plea Agreements. These commercial and constitutional rights are described in *Ricketts v. Adamson,* 483 U.S. 1, 16-23 (1987):

> . . . it seems clear that **the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement**, or in framing the terms of the debate. *E. g., Blackledge v. Allison,* 431 U.S. 63, 75, n. 6 (1977)(emphasis added).

At the same time, the *Ricketts* reminds us that the application of commercial law, where it is relevant, is constrained by the safeguards and freedoms guaranteed in the United States Constitution, such as the *Due Process Clause* :

> It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts . . . **Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.** (Emphasis Added).

The United States' reliance upon the "adhesion" terms of the plea agreement - such as being the sole arbiter of whether Moody's performance merited a reward - is misguided.

Ricketts makes it clear that such unilateral control by the government as to what it will and what it will not honor in its agreements is repugnant to the Constitution and will not be enforced by our courts:

> The determination of [a defendant's] rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the Due Process Clause. *Ricketts, supra, 21.*

This is Moody's situation. Although the literal terms of the plea agreement specifically reserve the decision of whether the United States is even obligated to perform that which it promised in the Plea Agreement, the Due Process Clause will not countenance such an unjust result.

Further, *Ricketts* makes it clear that an anticipatory breach which is based purely on the government's interpretation of the plea agreement - such as in Moody's case -is a violation of the Due Process Clause:

> It would be flatly inconsistent with these requirements to uphold as intelligently made a plea agreement which provided that, in the future, the agreement would mean whatever the State interpreted it to mean. . . . **The logic of the plea-bargaining system requires acknowledgment and protection of the *defendant's right to advance against the State a reasonable interpretation of the plea agreement*.** *Ricketts v. Adamson,* 483 U.S. 1, 16-23 (1987) (Emphasis added)

Thus, even though the United States and the District Court are correct when they point out that the language of Paragraphs

8(a) and 12 (b) remove the United States obligation from the terms of the contract, such a result is unconstitutional and cannot be enforced.

As *Ricketts* directs and the Plea Agreement itself provides in Paragraph 12, Moody's remedy is to enforce performance in the District Court. Without a hearing as to the merits of his claim, he is remediless because only the United States can file the motion to reduce his sentence.

Where, as here, the defendant has a good faith basis for believing that he has performed his commitments under the plea agreement and the government refuses to perform its side of the bargain, the defendant has a due process right to have his interpretation heard and ruled upon.

This right to due process protection arises from at least two stanchions: it is a right guaranteed by the Due Process Clause as far as his rights are concerned and it is a right to performance created by commercial law as well with regard to the property right which is created in his benefit through the contract of the plea agreement. It is unconstitutional for the government to impair the benefit fo a contract he or she has entered into with the government. All of these rights were denied Moody without even a brief hearing of his claims. The Constitution does not permit this and, therefore, the language of the Plea Agreement which requires such a result cannot and should not be given effect by this Court:

> To grant to one party -- here, the State -- the unilateral and exclusive right to define the meaning of a plea agreement is patently unfair. Moreover, such a grant is at odds with the basic premises that underlie the constitutionality of the plea-bargaining system. Guilty pleas are enforceable only if taken voluntarily and intelligently. *E. g., Boykin v. Alabama,* 395 U.S. 238 (1969).

The Court is saying that no one can be deemed to have met the due process requirement of having intelligently and voluntarily entered into a plea agreement - and therefore the agreement would be void altogether - where he cannot get his bargain even if he performs his obligation. No such bargain could be considered intelligent and no one would knowingly enter into it.

Accordingly, the Constitution will not allow the government to force an interpretation of a plea agreement which obligates the government to nothing upon a defendant. This is precisely what Moody asked the District Court to remedy in the motion whose denial is the subject of this appeal. He simply asked that the District Court hold a hearing to determine if the government was in fact acting out of bad faith or unconstitutionally.

The Supreme Court of the United States has made it clear that where the right to performance under a Plea Agreement exists, it cannot to be washed away with words. Further, the Supreme Court has made it clear that it views enforcement of plea agreements as a simple matter which should be addressed in the District Courts as another part of the sentencing aspect of a criminal trial:

> If the State and the defendant are then unable to resolve their dispute through further discussion, a ready solution exists — **either party may seek to have the agreement construed by the court in which the plea was entered.** *Ricketts v. Adamson,* 483 U.S. 1, 22 (1987) (Emphasis added).

It is impossible to square the District Court's ruling with either the spirit or the literal terms of *Ricketts*. Accordingly, the District Court's Order denying Moody a hearing as to what the basis is for the United States' refusing

to file a motion for a sentence reduction pursuant to Rule 35 (b) and the Plea Agreement must be vacated and the matter remanded for a hearing in accordance with this Court's Order.

X. Conclusion

For the reasons more fully stated *supra*, your Petitioner respectfully prays that this Honorable Court grant his Petition and issuer forth a *Writ of Certiorari* in his case.

Respectfully submitted,
THOMAS LEE MOODY

By: William L. Taliaferro, Jr.
Rabinowitz, Swartz, Taliaferro, Lewis,
Swartz & Goodove, P.C.
Town Point Center, Suite 800
150 Boush Street
Norfolk, Virginia 23510
Counsel for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

August 23, 2001

No. 01-6833
CR-99-66

UNITED STATES OF AMERICA

Plaintiff - Appellee,

v.

THOMAS LEE MOODY,

Defendant - Appellant

ORDER

Appellee has filed a motion to dismiss appeal. Appellant filed a response in opposition.

The Court grants the motion.

Entered at the direction of Judge King, with concurrence of Judge Wilkins and Judge Michael.

For the Court ,

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

v. Criminal Action No. 4:99cr66

Thomas Lee Moody,

Defendant.

ORDER

This matter is before the Court on Defendant Thomas Lee Moody's ("Mood/') Motion for Reduction of Sentence, pursuant to "the Federal Rules of Criminal Procedure, the United States Constitution, and 18 U.S.C. § 3553(e)." For the reasons set forth below, Defendant's motion is

DENIED.

On December 15,1999, Moody appeared before this Court and plead guilty to a One-Count Criminal Information. The Criminal Information charged him with Conspiracy to Possess with Intent to Distribute and to Distribute Fifty (50) Grams or more of Crack Cocaine in violation of21 U.S.C. §§ 841 (a)(1) and (b)(1)(A)(iii), all in violation of21 U.S.C. § 846. Moody signed a Waiver of Indictment fonn in open court and executed plea agreement that was filed in open court during the guilty plea hearing. On April 4,2000, this Court sentenced

Moody to two hundred ten (210) months imprisonment and *five* (3) years supervised release, The Court entered this judgment on April 5,2000. Moody did not appeal his conviction or sentence to the United States Court of Appeal for the Fourth Circuit.

I

Clerk. U.S. District Court
Newport News, Virginia

On April 5,2001, Moody filed the instant Motion for Reduction in Sentence. In support of this motion, Moody states that the entered into a plea agreement and cooperated with the Government in several debriefings because he believed that the Government would then "make a motion for a reduction in sentence base upon the substantial assistance." In fact, Moody states that "the Plea Agreement further stated that in exchange for Moody's guilty plea and cooperation as set out in the Plea Agreement, the United States bound itself to certain commitments including, *inter alia,* to move for a reduction in Moody's sentence if Moody provided 'substantial' assistance tote United States." Moody maintains that "since his sentencing [he] has been debriefed by the United States several times and has been fully cooperative and forthright in all respects." Although he "has no specific knowledge," Moody believes that "the information he provided the United States during his debriefings by federal agents led tote exposure and arrest of several persons engaged in criminal activities."

Despite Moody's alleged cooperation, however, the United States did not file a motion in this Court requesting reduction of moody' s original sentence. Following this, Moody states that "the refusal of the United States to file a motion [for reduction of sentence] is without any rational basis and derives from an unconstitutional motive." Based on this statement,

Moody contends that the Government' s refusal to file such a motion is subject to review by is Court, under Wade v. United States, *504* U.S. 181 (1992), to determine whether the Government's refusal is rooted in an unconstitutional motive. Further, Moody requests that this Court "order that a hearing be held to determine why the United States has refused to file a motion asking this Court to review the assistance that the Defendant has provided the United States and that at said hearing this Honorable Court 1) determine whether said assistance was provided pursuant tote obligations the Defendant assumed in entering the Plea Agreement 2) determine whether said assistance was of a substantial nature and 3) if the Court finds that the assistance [Moody] provided was pursuant tote Plea Agreement and substantial enough in nature to warrant a reduction in sentence, order an appropriate reduction in the Defendant's sentence as required by the United States Constitution."

Before turning to the Supreme Court's decision in Wade the Court will address the alleged "commitments" to which te Government is "bound" under the terms of the Plea Agreement. Moody argues that the Government "bound itself to certain commitments including... to move for a reduction of sentence in Moody's sentence if Moody provided 'substantial assistance' to the United States." The plea agreement itself, however, contains no language of any such "commitment." To the contrary, the plea agreement states that

> [t]he parties agree that te United States reserves its option to seek any departures from te applicable sentencing guidelines, including any departure below the mandatory minimum, pursuant to Section 5K of the Sentencing Guidelines and Policy Statements and Title 1 8, United States Code, Section § [sic] 3553(e), or Rule *35(b)* of the Federal Rules of Criminal Procedure, if in

> its sole discretion, the United States determines that the defendant has provided substantial assistance and that such assistance has been completed and such a departure is appropriate.

Plea Agreement¶ 9. Therefore, it is clear that te "option" to file a motion for a reduction of sentence lies within the Government's sole discretion. Moreover, this "option" is further conditioned on the Government's determination that the defendant has provided substantial assistance, completed the provision of such substantial assistance, and that a departure from the defendant' s original sentence is appropriate.

Furthermore, a judgment of conviction is final, unless (1) it is modified upon motion of the Director of te Bureau of Prisons, (2) corrected upon government motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3742 or *(3)* it is appealed and modified, if outside the guideline range, pursuant to l 8 U.S.C. § 3742. See 18 U.S.C. § 3582. In this case, the Director of the Bureau of Prisons has not made such a motion, nor has the Government. Moreover, Moody did not appeal his conviction to the Fourth Circuit, As such, none of the circumstances accounted for under § 3582 have occurred.

Moody is correct to point to Wade, however, for the proposition that a federal district court may subject the Government's refusal to file a "substantial assistance" motion to review for constitutional violations. However, as the Supreme Court ultimately determined in Wade, this Court finds that Moody has raised no claim to such review.

In Wad e te Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find

that the refusal was based on an unconstitutional motive." Id. at l *85-86.* Yet, the Court held that "[i]t follows that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing, Nor would additional but generalized allegations of improper motive." Id. at 186 (citing united States v. Redondo-Lemos. *955* F.2d 1296, 1302-03(9th Cir. 1992); United Sthatesv. Jacob, 781 F.2d 643, 646-47 (8th Cir. 1986); United States v. Gallegos-Curiel, 681 F.2d l 164, 1169(9th Cir. 1982) (Kennedy, J.); United States v. Betos, 501 F.2d 1207, l 211 (2d Cir. 1974)). In Wade, the Court found that the defendant had failed to make such a "'substantial threshold showing"' because he "never alleged, much less claimed to have evidence tending to show, that the Government refused to file a motion for suspect reasons such as his race or his religion." Id.

As in Wade, this Court finds that Moody has failed to demonstrate that his naked allegation of an "unconstitutional motive" rises to the level warranting judicial inquiry. Moody has simply made "generalized allegations of improper motive;' unsupported by any claims of evidentiary support. The Supreme Court has determined that such a paltry showing does not entitle a defendant to a remedy, additional discovery, or an evidentiary hearing Additionally, Mood/s attempt to explain the extent of his "substantial assistance" to the Government is likewise not enough to demonstrate the existence of an "unconstitutional motive." As the Court stated in Wade , "although a showing of assistance is a necessary condition for relief, it is not a sufficient one." Id. at 187. Indeed, the Government's decision to not file a motion for reduction of sentence may have been based on its own "rational assessment of the cost and benefit that would flow from moving." Id.

For the reasons set forth above, Defendant's Motion for Reduction in Sentence is **DENIED. The** Clerk is **DIRECTED** to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

Norfolk, Virginia

April 20, 2001
CC:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v. **CRIMINAL NUMBER** 4:99cr66

Thomas Lee Moody,

Defendant.

MOTION FOR REDUCTION IN SENTENCE

COMES NOW the Defendant, Thomas Lee Moody (Moody), by counsel, and pursuant to the Federal Rules of Criminal Procedure, the United States Constitution and 18 U.S.C. 3553(e), moves this Honorable Court for an Order reducing his previously imposed sentence and in support thereof states as follows:

5. That Moody and the United States entered into a Plea Agreement, attached hereto as Exhibit "A", wherein Moody

agreed to plead guilty to an One-Count Criminal Information charging him with Conspiracy to Possess with the Intent to Distribute 50 Grams or More of Crack Cocaine in violation of 21 U.S.C. 846 in exchange for cooperating with the United States. Said cooperation included, *inter alia*, being entirely truthful during debriefings with the United States regarding any matter asked of him and testifying truthfully at any time that the United States might need him as a witness.

6.That the Plea Agreement further stated that in exchange for Moody's guilty plea and cooperation as set out in the Plea Agreement, the United States bound itself to certain commitments including, *inter alia*, to move for a reduction in Moody's sentence if Moody provided "substantial" assistance to the United States.

7.That on December 15, 1999, the United States and Moody appeared before this Honorable Court and moved that the Court accept the Plea Agreement that the parties had previously entered into.

8.That the Court then accepted said Plea Agreement and made it part of the trial record.

9.That after the Court had accepted the Plea Agreement, Thomas Lee Moody appeared before the Court and, pursuant to the Plea Agreement, pled guilty to a One-Count Criminal Information charging him with Conspiracy to Possess with the Intent to Distribute 50 Grams or More of Crack Cocaine in violation of 21 U.S.C. 846. The Court then set April 4, 2000, as Moody's sentencing date.

10.That on April 4, 2000, this Honorable Court sentenced Thomas Lee Moody to a penitentiary sentence of 210 months.

11.That at the time Moody was sentenced by this Honorable Court, the United States had yet to complete its debriefing of Moody so that no true measure of Moody's assistance could be gauged at that time and, therefore, the United States did not move for a reduction in Moody's sentence at that time.

12.That at the time Moody was sentenced this Honorable Court stated from the Bench that the sentence imposed, while required by the Sentencing Guidelines, was excessive in light of the lesser sentences that other more senior members of the conspiracy had received from the same court for the same transactions and urged counsel for the parties to bring the matter back for a reduction of sentence if appropriate. SEE Transcript of Sentencing Hearing, Exhibit "B."

13.That no motion for a reduction in Moody's sentence was made at the Sentencing Hearing and none has been made to date.

14.That since his sentencing Moody has been debriefed by the United States several times and has been fully cooperative and forthright in all respects.

15.That Thomas Lee Moody has no specific knowledge but avers that the information he provided the United States during his debriefings by federal agents led to the exposure and arrest of several persons engaged in criminal activities.

16.That because no motion for a reduction of sentence was made by the United States prior to Moody's sentencing, the only avenue available to Moody for a reduction of sentence pursuant to the Plea Agreement after the sentence has been imposed is pursuant to 18 U.S.C.3553(e).

17.That a motion made pursuant to 18 U.S.C.3553(e) can only be brought by the United States and must be made within one year of the date of the entry of the Sentencing Order.

18.That despite Moody's full performance of his obligations under the Plea Agreement, the United States has refused to file a motion asking that this Honorable Court reduce Thomas Lee Moody's previously imposed sentence because of the substantial assistance that he has provided the United States.

19.That the refusal of the United States to file a motion pursuant to Section 3553(e) is without any rational basis.

20.That the United States is violating Moody's Constitutional rights by unreasonably refusing to file a motion

pursuant to Section 3553(e) after Moody has fully performed his obligations under the Plea Agreement.

21.That the Plea Agreement between Moody and the United States is a valid contract which this Honorable Court must enforce both for Constitutional reasons and reasons which sound in contract law.

22.That the Plea Agreement between the United States and Moody is a contract wherein the consideration given by Thomas Lee Moody to support the contract was the promise to cooperate with the United States while the consideration given by the United States in exchange for Moody's promise to cooperate was its agreement to make a motion for a reduction in sentence based upon the substantial assistance which Thomas Lee Moody was to provide law enforcement.

23.That as the Plea Agreement is a contract, the Plea Agreement is subject to contract law and - where not explicitly stated - contains an implicit term of good faith and fair dealing between the parties.

24.That the United States has violated the covenant of good faith and fair dealing by unreasonably refusing to make the motion for a reduction of Moody's sentence.

25.That the Plea Agreement is a valid contract between the United States and Thomas Lee Moody and, therefore, Thomas Lee Moody, is entitled to performance by the United States of its obligations under the Plea Agreement.

WHEREFORE, your Defendant, by counsel, respectfully prays that this Honorable Court order that a hearing be held to determine why the United States has refused to file a motion asking this Court to review the assistance that the Defendant has provided the United States and that at said hearing this Honorable Court 1) determine whether said assistance was provided pursuant to the obligations the Defendant assumed in entering the Plea Agreement, 2) determine whether said assistance was of a substantial nature and 3) if the Court finds that the assistance Thomas Lee Moody provided was pursuant to the Plea Agreement and substantial enough in nature to

warrant a reduction in sentence, order an appropriate reduction in the Defendant's sentence as required by the United States Constitution.

Respectfully Submitted,

By:_____

OF COUNSEL

William L. Taliaferro, Jr., Esq.
VSB Number 12835
Swartz, Rabinowitz, Taliaferro,
Lewis, Swartz and Goodove
Suite 800
150 Boush Street
Town Point Center
Norfolk, VA 23510
757-622-3931

CERTIFICATE

I certify that on April 5, 2001, a true copy of the foregoing motion was mailed to Janet S. Reincke, Esq., Assistant U. S. Attorney.

_____
WILLIAM L. TALIAFERRO

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 235 - APPEAL

18 U.S.C. § 3742 - Review of a sentence.

(a) Appeal by a Defendant. - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. - The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements. - In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure -

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on Review. - If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals -

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration. - Upon review of the record, the court of appeals shall determine whether the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for -

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and Disposition. - If the court of appeals determines that the sentence -

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and -

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a Sentence by a Magistrate. - An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) Guideline Not Expressed as a Range. - For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(Added Pub. L. 98-473, title II, Sec. 213(a), Oct. 12, 1984, 98 Stat. 2011; amended Pub. L. 99-646, Sec. 73(a), Nov. 10, 1986, 100 Stat. 3617; Pub. L. 100-182, Sec. 4-6, Dec. 7, 1987, 101 Stat. 1266, 1267; Pub. L. 100-690, title VII, Sec. 7103(a), Nov. 18, 1988, 102 Stat. 4416; Pub. L. 101-647, title XXXV, Sec. 3501, 3503, Nov. 29, 1990, 104 Stat. 4921; Pub. L. 103-322, title XXXIII, Sec. 330002(k), Sept. 13, 1994, 108 Stat. 2140.)

U.S. Code 18 U.S.C. § 3742

FEDERAL RULES OF CRIMINAL PROCEDURE

VII. JUDGMENT

Rule 35. Correction or Reduction of Sentence.

(a) **Correction of a sentence on remand.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court --

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) **Correction of sentence for changed circumstances.** The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

(c) **Correction of sentence by sentencing court.** The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical. technical, or other clear error.

[Amended Feb. 28, 1966, eff. July 1, 1966; Aug. 1, 1979; Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985 until Nov. 1, 1986, extended to Nov. 1. 1987; Oct. 12, 1984, P. L. 98-473, Title II, Ch. II, §§ 215(b), 98 Stat. 2015, Oct. 27, 1986, P. L. 99-570, Title 1, Subtitle A, §§ 1009(a), 100 Stat. 3207-8; Dec. 1, 1991.]